IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 16720 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BABUBHAI VIRSINGBHAI NINAMA

Versus

COMMISSIONER OF POLICE

Appearance:

1. Special Civil Application No. 16720 of 2003

MR ANIL S DAVE for Petitioner No. 1

MR KAMEN N SHUKLA for Petitioner No. 1

Ms. P B Sheth, AGP for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 10/03/2004

ORAL JUDGEMENT

The petitioner-detenu has preferred this petition

under Article 226 of the Constitution of India for appropriate writ, order or direction for quashing and setting aside an order dated 22.9.2003 passed by respondent No.1 under section 3(2) of the Gujarat Prevention of Anti-Social Activities Act, 1985 (for short, 'PASA Act') directing detention of the present petitioner on the ground that seven offences were registered against the petitioner during the period from 9.7.2002 to 3.8.2003 and two unnamed witnesses had given statement against the petitioner stating that the petitioner was guilty of violating "public order". The petitioner was arrested on the date of the order itself and he is under detention since then. The petitioner has challenged the aforesaid order of the detention on various grounds. It has been contended that the petitioner has not committed any violation of public order and that the order has been passed against the petitioner without proper application of mind. That therefore, the order of detention is illegal and deserves to be set aside. The petitioner has, therefore, prayed that the impugned order of detention be set aside and the petitioner may be set at liberty forthwith.

2. On receiving the petition, rule was issued and in response to the service of notice of rule, Ms. Paurnami B Sheth, learned AGP has appeared. She has also submitted affidavit of the detaining officer which is taken on record. At the stage of final hearing, learned Advocate for the petitioner has argued that though seven offences have been registered against the petitioner during the period from July, 2002 to August, 2003 and though two unnamed persons appear to have given some statements against the petitioner, the petitioner is not shown to be a person who could be treated to be dangerous person or a person who has committed violation of public order and, therefore, the detaining authority ought not to have passed the order in question directing his detention in terms of the said order.

3. On going through the detention order dated 22.9.2003 placed at page no.15, it is found that seven offences have been registered against the petitioner during the aforesaid period. They all related to the offences punishable under section 447, 457, 379 and 380.

4. In sofar as the offence of theft and criminal trespass are concerned, it has to be observed that these are the offences relating to the moveable and immoveable property of a individual person. In other words, these are offences against the individuals and it may amount to problem of law and order. However, it is difficult to

accept that by committing the aforesaid offences, the petitioner had violated public order. Then we can refer to the statement of witnesses which have been referred in para 2 of the order of detention. Reference is made to two unnamed witnesses who had given statements to the police officer to the effect that the petitioner was guilty of violation of public order. Witness No.1 appears to have stated before police that on 7.7.2003 at about 5 p.m., the petitioner along with other detenu had come to the spot and they had threatened the persons staying there. One person was directed to purchase a T.V. in a sum of Rs.2500/-. When the said person declined to purchase the same, the petitioner and other detenus were excited and they started beating the said persons. When the other persons had gathered together there, the petitioner and other detenus threatened them with weapons in their hands. The second witness has also made similar statement according to which the petitioner and other detenus had told one person as to why he used to inform the police against the present petitioner and other detenus. There also people had gathered together and the petitioner and other detenus had shown weapons and they were forced to run away from the said place.

5. On the strength of the aforesaid statement, learned AGP has submitted that these are the acts of the petitioner and other detenus amounting to threat to the public order and they are not the incidents with respect to the threat to the law and order only. In order to support the said detention, learned AGP has relied upon a decision in the case of Amanullakhan K Pathan v. State of Gujarat reported in 2000 (4) GLR 3623. It would be worthwhile to refer to the relevant portion from paras 4 and 5 of the said decision for ready reference as under:

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"para 4. If the grounds of detention is examined, it is crystal clear that apart from the criminal case which had been registered against the detenu for having formed a gang and hatched a conspiracy to extort money from the innocent citizens by threatening them and keeping them under constant fear of death, the two witnesses examined by the detaining authority narrated the incident that happened on 26.7.1998 and 2.8.1998 in which the detenu was involved and on the first occasion a sum of Rs.1 lac was demanded and when the person concerned refused, he was dragged and assaulted and on the second occasion, a sum of Rs.50 thousand was demanded and on refusal, the

persons were dragged on the road and were beaten on the public road. It is not the grievance of the detenu that the statements of the aforesaid two witnesses had not been appended to the grounds of detention or had not been mentioned in the grounds of detention. In fact, the grounds of detention clearly mention the aforesaid state of affairs and there is no bar for taking these incidents into consideration for the satisfaction of the detaining authority that whether the person is a "dangerous person" within the ambit of section 2(c) of the Act.

para 5. The activities of the detenu by trying to extort money from ordinary citizens by putting them to fear of death and on their refusal to part with the money to drag them and torture them on public road, undoubtedly affected the even tempo of life of the society, and therefore, such activities cannot be said to be a mere disturbance of law and order. In Court's considered opinion, the activities of the detenu are such that the detaining authority was satisfied that such activities amount to disturbance of public order and to prevent such disturbance the order of detention was passed.

Even an activity violating an ordinary legal provision may in a given case be a matter of public order. It is the magnitude of the activities and its effect on the even tempo of life of the society at large or with a section of society that determines whether the activities can be said to be prejudicial to the maintenance of public order or not."

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6. On relying upon the said decision, the learned AGP has submitted that two unnamed witnesses clearly go to show that the petitioner is guilty of violation of public order and, therefore, the order of detention is quite justified. On the other hand, learned Advocate for the petitioner has relied upon a decision of this court dated 5.2.2004 rendered in Special Civil Application No.17536/2003. (Coram: Hon'ble Mr Justice N G Nandi). There also the matter was related to registration of certain offences committed by the detenu. Moreover, there were some statements of unnamed witnesses. There it has been observed that the facts were directed against the individuals and simply on the ground that the

petitioner and associates were alleged to have rushed towards the people who had gathered over there with gupti and knife, would not tantamount to an act which would affect public order and prejudicial to the maintenance of public order and such acts cannot have any adverse effect disturbing even the tempo of life or peace and tranquility of the locality that would be casual and isolated incidents. While dealing with the said aspects, the learned Judge had an occasion to deal with the cases of Smt. Tarannum v. Union of India, reported in 1998 Cr.LJ 1414. The learned Judge also referred a case of Mustakmiya Jabbarmiya Shaikh v. M M Mehta, Commissioner of Police, reported in XXXVI (2) GLR 1268. Even the case of Amanulla Khan Kudeatalla Khan Pathan v. State of Gujarat, reported in AIR 1999 SC 2197 was also referred in para 8 of the said judgment. On consideration of the aforesaid judgments, this Court has observed that these are stray individual incidents which may affect law and order but it cannot be said that these incidents would affect public order.

7. Mr A S Dave, learned Advocate for the petitioner has also relied upon a decision of this Court in the case of Ashokbhai Jivraj v. Police Commissioner, Surat, reported in 2000(1) GLR 816 wherein the Division Bench of this Court was required to deal with the situation arising from law and order. Four cases were registered against the detenu under the IPC. This Court observed that looking to the incidents, the case would fall under the maintenance of "law and order" and not "public order". The Division Bench of this Court made further observation that subjective satisfaction arrived at by the detaining authority cannot be said to be legal or valid. In para 21 of the said decision, the Division Bench of this Court has made the following observation:

> "21. So far as the cases against the detenu are concerned, they have already been registered. They were against persons mentioned therein which is stated in the grounds of detention by the detaining authority. Regarding two statements, having taken into account the law laid down by the Supreme Court in Ram Manohar Lohia v. State of Bihar, AIR 1966 SC 740 and reiterated from time to time including the decisions referred to by us hereinabove, the case falls under the maintenance of "Law and Order" and not "Public Order". The subjective satisfaction arrived at by the detaining authority, therefore, cannot be said to be legal, valid and in accordance with law. Since in the facts and circumstances, an

> order of detention could have been passed by the detaining authority for maintenance of "Public Order", the order deserves to be quashed and is hereby set aside. The detenu is ordered to be set at liberty forthwith unless required in any other case. Appeal is accordingly allowed. No order as to costs. Before parting with the matter, we may observe that recently, we have come across few cases wherein no counter-affidavits are filed by the respondents. It is settled law that whenever an order of detention is challenged by a detenu or by his "next friend", it is the duty of the authorities to justify the action by filing counter-affidavit preferably by the detaining authority himself, unless there are circumstances which may justify filing of affidavit by an officer or authority other than the detaining authority (Vide Halsbury's Laws of England, 4th Edition, vol.II, paras 1492-95, pp. 791-33; Mohd. Subrati v. State of W.B., AIR 1973 S 2684, Khudram v. State of W.B., AIR 1975 SC 550; Ranjit Singh v. State of Pepsu, AIR 1959 SC 843, Dulal v. State of W.B. AIR 1974 SC 2561; Abdul Gaffar v. State of W.B., AIR 1975 SC 1496, Krishna Murari v. Union of India, AIR 1975 SC 1877, Shaikh Hanif v. State of W.B. AIR 1974 SC 679; Vijay Narain v. State of Bihar, AIR 1984 SC 1334; Suraj Pal v. State of Maharashtra, AIR 1986 SC 2177."

8. Learned Advocate for the petitioner has also referred to a decision of this Court dated 22.7.2002 in Special Civil Application No.5745/2002. In that matter, the learned Judge relied upon the decision in the case of Ashokbhai Jivraj v. Police Commissioner, Surat (Supra) and found that the case before him was on par with the case mentioned in the aforesaid decision and, therefore, on following the principles laid down in Ashokbhai Jivraj (supra), the learned Judge found that there was no scope forn the detaining authority for the to exercise of powers vested with him under section 3 of the said Act.

9. In above view of the matter that it is found that in the present case also six to seven cases under IPC have been registered against the petitioner, nevertheless, it is also the fact that these are the offences which can be treated to be individual offences against the properties of the individuals involved in those seven cases. Such offences or such acts on the part of the petitioners could not be treated to be any threat to the "public order" and, therefore, the

detaining authority would not be justified in passing orders of detention on such grounds, which may amount to threat to "law and order". As regards two other statements of unnamed persons, again it is a matter of stray incidents with respect to different persons, looking to the time lag between the two and looking to the time lag between the dates of the occurrences of those incidents and the dates on which their statements came to be recorded by the police officers and the dates on which those statements were verified by the detaining authority, I am of the opinion that it cannot be said that again these statements would give a cause of action for the detaining authority for passing the order of detention against the petitioner. It is extremely clear that before passing an order of detention of a detenu, the detaining authority must come to a definite finding that there is threat to the "public order". The difference between "public order and "law order" has been demonstrated in the earlier decisions and considering those decisions, it is very clear that the present case would not fall within the category of threat to a public order and therefore the order of detention cannot be sustained in the eye of law. In other words, the detaining authority had no reason to pass an order for detaining the detenu in exercise of powers conferred by section 3(2) of the said Act. In that view of the matter, when the order of detention has been passed by the detaining authority without having adequate grounds for passing the said order, cannot be sustained and, therefore, it deserves to be quashed and set aside.

10. For the foregoing reasons, this petition is allowed. The impugned order dated 22.9.2003 passed by respondent No.1 in exercise of powers under section 3(2) of the PASA Act detaining the present petitioner, is ordered to be set aside. The detenu is ordered to be set at liberty forthwith, if no longer required in any other case. Rule is made absolute to the aforesaid extent. No order as to costs. D.S. permitted.

[D P Buch, J.]

msp